Conversent Communications

VIA OVERNIGHT & ELECTRONIC MAIL

August 16, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: Proceeding by the Department of Telecommunications and Energy on Its Own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers, D.T.E. 03-60

Dear Ms. Cottrell:

Enclosed for filing are Conversent's Reply Comments in Response to June 15 Order. Please contact me if you have any questions. Thank you.

Very Truly Yours,

Gregory M Kennan

Gregory M. Kennan
Director of Regulatory Affairs & Counsel
Conversent Communications of Massachusetts, LLC

GMK/cw

Enclosure

cc: Tina W. Chin, Hearing Officer
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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on Its Own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	**D.T.E. 03-60**

CONVERSENT'S REPLY COMMENTS IN RESPONSE TO JUNE 15 ORDER

In its initial comments filed on July 30, 2004, Conversent Communications of Massachusetts, LLC ("Conversent") showed that it would be lawful and appropriate for the Department to require Verizon to continue offering UNEs — particularly high-capacity DS1 and DS3 loops and dedicated interoffice transport (including DS1, DS3, and dark fiber interoffice transport) — at the rates, terms, and conditions in Verizon's wholesale tariff unless and until the FCC issues final rules that expressly supersede such state requirements. Nothing in Verizon's initial comments showed that the Department could not or should not impose such a requirement.

Conversent nonetheless responds hereby to two especially erroneous Verizon claims:

- First, that the *USTA II* decision invalidated the FCC's unbundling requirements with respect to high-capacity DS3 and DS1 loops. It did not. Verizon improperly extrapolates one imprecise parenthetical reference in the D.C. Circuit's opinion regarding dedicated transport and stretches that reference far beyond its intended meaning.

- Second, that there has never been a lawful unbundling requirement for the network elements affected by the *USTA II* remand. That claim is legally incorrect, and is belied by Verizon's statements and its conduct over the years.

Both of these Verizon claims are erroneous and the Department should reject them out of hand.

Discussion

I. The *USTA II* Remand Does Not Affect High-Capacity Loops.

In our initial comments, Conversent showed that the D.C. Circuit's vacating of the FCC's unbundling rules did not apply to high-capacity DS3, DS1, and dark fiber loops. Conversent's Comments, Part II, pp. 3-4. Verizon continues to argue, incorrectly, that *USTA II* invalidated the unbundling requirements for high-capacity loops. Verizon constructs this argument upon an out-of-context extrapolation of one imprecise parenthetical reference in the Court's opinion. It seizes upon that reference and stretches it far beyond its intended meaning.

The sentence containing the parenthetical reference is as follows:

> The Commission has made multiple impairment findings with respect to dedicated transport elements (transmission facilities dedicated to a single customer or carrier), varying the findings by capacity level.

USTA II, 359 F.3d at 573. Verizon claims that the Court's use of the terms "transmission" and "customer" makes the Court's discussion concerning dedicated transport also applicable to loops. Verizon apparently believes that the Court has fashioned a new definition of facility — "transmission facility" — that includes both loops and dedicated transport. Verizon Comments at 4 n. 4.

Verizon's interpretation is a clear case of the minnow swallowing the whale. The word "transmission" does not appear again in the Court's discussion of dedicated transport (Part II.B.1 - B.2.a, pp. 573-75). The term "dedicated transport" or "transport" however, appears no fewer than 15 times. See the attached excerpt from the *USTA II* opinion.

Furthermore, in the discussion of dedicated transport, the Court cites multiple paragraphs of the TRO.[1] All but one of those citations refers to a paragraph in that portion of the TRO discussing dedicated transport (¶¶ 359-418).[2] Not a single one of the Court's citations is in the discussion of loops (¶¶ 197-342).

The Court's summary of its rulings also shows that loops simply were not included. The Court said:

> To summarize: we vacate the Commission's sub-delegation to state commissions of decision-making authority impairment determinations, which in the context of this Order applies to the sub-delegation scheme established for mass-market switching and certain dedicated transport elements (DS-1, DS-3 and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.

USTA II, 359 F.3d at 594. Loops are not mentioned.

In addition, the D.C. Circuit affirmed the FCC's unbundling decision with respect to fiber/copper hybrid loops. *Id.* at 578-83. Part of the FCC's decision was to require ILECs to continue unbundling the time-division multiplexing (TDM) capabilities of hybrid loops so as to allow CLECs to provide DS1 and DS3 paths over hybrid loops. *TRO* ¶ 289. The D.C. Circuit unquestionably was aware of the unbundling requirement for the DS1 and DS3 TDM capabilities; the Court cites ¶ 289 in its opinion. 359 F.3d at 578. It would make no sense for the Court to invalidate the unbundling requirements for DS1 and DS3 loops while affirming the FCC's mandate to continue to unbundle the DS1 and DS3 capabilities of hybrid loops. Thus, the D.C. Circuit's affirmance of the hybrid loop rules shows its intent that DS1 and DS3 loops continue to be unbundled.

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[1] Specifically, ¶¶ 359, 372, and 381-93 on p. 573; ¶¶ 398, 399-401, 405-09, 400, 412-16, 410, 411, 394, 360, 401, and 409 on p. 574; ¶ 401 on p. 575.

[2] The remaining footnote is to the FCC's general impairment analysis, ¶¶ 84 *et seq.* 359 F.3d at 575.

There also is nothing to suggest that the Court intended to craft a new category of unbundled network element, the "transmission" element. It is not the Court's prerogative to establish the categories of network elements that must be unbundled. While the Court certainly has the responsibility to review FCC rules, it would be an improper invasion of administrative agency responsibility for the Court to establish such a category in the first instance. To be sure, if the Court intended to create a new category of UNE, it would have offered more explanation than a single parenthetical reference.

Even if the Court's invalidation of the sub-delegation scheme did apply by extension to high-capacity loops, the Court did not invalidate the nationwide impairment findings with respect to high-capacity loops as it did with dedicated transport and mass-market switching. See Conversent's Comments, Part II. Therefore, the most that can be said is that the Court invalidated the sub-delegation of responsibility to the states to find *exceptions* to the national impairment finding for high-capacity loops. The nationwide impairment finding itself stands. As the Court stated, "the petitions for review are otherwise denied." *USTA II,* 359 F. 3d at 594.

II. The Department Should Reject Verizon's Incorrect Claim that There Have Never Been Lawful Unbundling Requirements for *USTA II* UNEs.

The Department should reject Verizon's claim that there never have been lawful unbundling requirements for the elements vacated by *USTA II*. Verizon's Comments at 33. Verizon's claim has at least two implications: that Verizon has no obligation to provide these elements, and that there has been no "change of law" requiring negotiation or other process under the "change of law" provisions of interconnection agreements. If either case is true, Verizon could unilaterally decide to stop providing the elements at TELRIC rates at any time.

Verizon's claim arises from its erroneous position that the only source of unbundling requirements is FCC regulations. As Conversent pointed out in its initial comments, state law and state tariffs provide an adequate and lawful basis for the Department to continue unbundling the network elements specified in Tariff D.T.E. No. 17.

Furthermore, Verizon's argument suggests that it does not believe that FCC or Department orders have any lawful effect. Certainly, the orders of the FCC and various state commissions requiring unbundling of network elements were valid when issued. Indeed, Verizon and other ILECs complied with those FCC and state orders. That certain of those unbundling requirements where subsequently invalidated on appeal did not affect their validity prior to the appellate court decision.

Carried to its logical conclusion, Verizon's argument would suggest that until the United States Supreme Court expressly affirms any order or any requirement issued by the FCC or a state commission, Verizon has no obligation to comply with it. Verizon's interpretation makes a mockery of the administrative authority of the FCC and other administrative agencies.

Finally, Verizon's statements and its conduct belie its argument. Verizon's counsel explicitly stated to the D.C. Circuit that if the Court invalidated any of the FCC's unbundling requirements, Verizon would continue to have an unbundling obligation under the terms of the various interconnection agreements. "[W]e are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements." *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Transcript of Oral Argument, January 28, 2004, at 7-11 (quoted in AT&T Comments at 3). In this sentence, Verizon also acknowledged that that the states have the authority to require Verizon to continue performing its unbundling obligations.

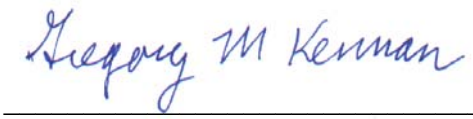
Verizon's conduct over a period of years also shows that it believes that it has been subject to unbundling requirements. Verizon has been providing dark fiber (one of the elements its claims has never been subject to a lawful unbundling requirement) since December 1996, when the *Department* — not the FCC — ordered unbundling of dark fiber in the *Consolidated Arbitrations* Phase 3 Order. Clearly, for more than seven years, Verizon thought that it had a legal obligation to unbundle dark fiber pursuant to the Department's order. As the arbitrator appointed by the Rhode Island Commission recently wrote: "VZ-RI is an aggressive competitor; it would not provision wholesale services merely out of compassion for unfortunate, little CLECs." *In re: Petition of Verizon-Rhode Island For Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order,* Docket No. 3588, Procedural Arbitration Decision at 11 (April 9, 2004).

Conclusion

For the reasons stated above and in Conversent's initial comments, notwithstanding any interim rules that the FCC might issue, the Department should require Verizon to continue to offer UNEs subject to the *USTA II* remand at the rates, terms, and conditions in its wholesale tariff until the FCC issues final rules that expressly supersede Verizon's state-law requirements.

August 16, 2004

Respectfully Submitted,



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adopt, in the light of those estimations, a policy that it can reasonably say advances the goals of the Act.

B. *Unbundling of High-Capacity Dedicated Transport Facilities*

1. *Unlawfulness of the delegation to the states and the national impairment finding*

The Commission has made multiple impairment findings with respect to dedicated transport elements (transmission facilities dedicated to a single customer or carrier), varying the findings by capacity level. First, it found that competing providers are not impaired without unbundled access to "OCn" transport facilities (very high-capacity transport facilities or bandwiths within such facilities), Order P P 359, 372, and all petitioners appear to accept that finding. Second, the Commission found that competitors are impaired without unbundled access to DS1 transport, DS3 transport, and dark fiber transport, but made this nationwide impairment finding subject to variation by state commissions applying specific [**46] "competitive triggers." *Id.* P 359; see also *id.* P P 381-93. Explaining this latter decision, the Commission observed that its nationwide impairment findings for DS1, DS3, and dark [*574] fiber were based on "aggregated data" and frankly acknowledged that competitive alternatives are available "in some locations." *Id.* P 398. The Commission declared that it did not need to resolve "the factual identification of where alternative facilities exist... Because we recognize that the record is insufficiently detailed to make more precise findings regarding impairment, we delegate to the states, subject to appeal back to this Commission if a state fails to act, a factfinding role to determine on a route-specific basis where alternatives to the incumbent LECs' networks exist such that competing carriers are no longer impaired." *Id.* P 398.

Specifically, the Commission instructed states to apply two competitive triggers on a route-by-route basis. *Id.* P P 399-401. First, the "self-provisioning" trigger required states to find no impairment if three or more competitors had deployed non-ILEC transport facilities along a specific route. *Id* [**47] . P P 400, 405-09. Second, the "wholesale facilities" trigger required states to find no impairment if two or more competing carriers were immediately able and willing to sell transport along a given route at wholesale rates. *Id.* P P 400, 412-16. Even where the triggers were not satisfied, the FCC allowed a finding of non-impairment if a state, applying seven criteria (all quite fluid and none quantified), determined that the route was suitable for multiple competitive supply. *Id.* P 410. If a state believed that there was impairment on a specific route despite facial satisfaction of the self-provisioning trigger, it could petition the Commission for a waiver. *Id.* P 411.

As we explained in the mass market switching context, HN20 the Commission may not subdelegate its § 251(d) authority to state commissions. Although the Commission characterizes the states' role as "fact-finding," Order P 394, the characterization is fictitious. It is the states, not the FCC, that determine whether the competitive triggers, or the Commission's numerous and largely unquantified alternative criteria, are satisfied; it is the states that issue binding orders, subject only [**48] to the Commission's discretionary review. And, as with mass market switching, the Order itself suggests that the Commission doubts a national impairment finding is justified on this record. *Id.* P P 360, 394, 398. We therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme.

2. *Remaining dedicated transport issues*

The ILECs have raised two additional issues about the Commission's treatment of dedicated transport, and the CLECs yet another. We address the ILECs' objections here, and that of the CLECs (which relates to so-called "entrance facilities") below in the portion of the opinion devoted to their claims.

a. *Route-specific analysis of dedicated transport*

In *USTA I* we expressed skepticism regarding whether there could be impairment in markets "where the element in question--though not literally ubiquitous--is significantly deployed on a competitive basis," giving as a specific example interoffice dedicated transport. 290 F.3d at 422. We also instructed the Commission, as noted above, to apply a "nuanced" concept of impairment connected to "specific [**49] markets or market categories." *Id.* at 426. Any process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment is counted.

[*575] For dedicated transport elements the Commission decided that the appropriate market was not a geographic market (e.g., a Metropolitan Statistical Area ("MSA"), as the ILECs urged, or general customer class), but rather a specific point-to-point route. Thus, for example, the fact that dedicated transport facilities are widely deployed within one MSA does not, in the Commission's view, necessarily preclude a finding of impairment between two specific points within that MSA, if deployment has not satisfied the Commission's competitive "triggers" on that route.

We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment. Suppose points A, B, and C are all in the same geographic market and are similarly situated with regard to the "barriers to entry" that the Commission says are controlling. See Order P P 84 et seq. Suppose further that multiple competitors supply DS1 transport between points A and B, but only [**50] the ILEC and one other CLEC have deployed DS1 transport between A and C. The Commission cannot ignore the A-B facilities deployment when deciding whether CLECs are impaired with respect to A-C deployment without a good reason. The Commission does explain why competition on the A-B route should not be *sufficient* to establish competition is possible on the A-C route, Order P 401, but this cannot explain the Commission's implicit decision to treat competition on one route as *irrelevant* to the existence of impairment on the other. Nor does the Commission explain whether, and why, the error costs (both false positives and false negatives) associated with a route-by-route market definition are likely to be lower than the error costs associated with alternative market definitions. While it may be infeasible to define the barriers to entry in a manageable form, i.e., in such a way that they may usefully be applied to MSAs (or other plausible markets) as a whole, the Commission nowhere suggests that it explored such alternatives, much less found them defective.

b. *Wireless providers' access to unbundled dedicated transport*

In addition to their general challenge to the [**51] FCC's provisional national finding that competitors are impaired without access to dedicated transport facilities, the ILEC petitioners also attack the Commission's conclusion that providers of wireless service (also known as commercial mobile radio services, or "CMRS") qualify for unbundled access to these facilities. According to the ILECs, the Commission not only failed to conduct the requisite impairment analysis for wireless providers, but in fact found that wireless growth has been "remarkable": 90% of the U.S. population lives in areas served by at least three wireless providers, 40% of Americans and 61% of American households own a wireless phone, wireless prices have been steadily declining, and 3-5% of wireless customers use wireless as their only phone, treating it as a full substitute for traditional land line service. Order P 53. Although the ILECs implicitly concede that wireless providers would be impaired if they were denied *any* access to ILEC dedicated interoffice transport facilities, they point out that wireless providers have traditionally purchased such access from ILECs at wholesale rates (a transaction classified, since adoption of the Act, under § 251(c)(4)). [**52] And the data above clearly show that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic. Indeed, the multi-million dollar sums that the Commission regularly collects in its auctions of such spectrum, see, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile [*576] Services*, Seventh Report, FCC 02-179, 12 F.C.C.R. 12985 (July 3, 2002), Table 1B, and that firms pay to buy already-issued licenses, see, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, FCC 03-150, 18 F.C.C.R. 14783 (July 14, 2003), P P 42-44, seem to indicate that wireless firms currently expect that net revenues will, by a large margin, more than recover all their non-spectrum costs (including return on capital).

The FCC and the wireless intervenors do not challenge the assertion that the current regime has witnessed a rapidly expanding and prosperous market for wireless service. Rather, they rely on the principle that "evidence that requesting carriers are using incumbent LEC tariffed services" is not "relevant to [the] unbundling determination." Order P 102.

The Commission offers several [**53] justifications for its decision to treat special access availability as irrelevant to the impairment analysis. None withstands scrutiny. First, the Commission suggests that it would be

> inconsistent with the Act if we permitted the incumbent LEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. Such an approach